The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

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Petition of New England Gas Company for approval of an earnings sharing rate adjustment.

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I. INTRODUCTION

A. Procedural History

On September 16, 2008, New England Gas Company ("NEGC" or "Company") filed with the Department of Public Utilities ("Department") a request for approval of an earnings sharing rate adjustment ("Company Petition"). The Company proposes this rate adjustment pursuant to Article 2, § 2.10 of the Settlement approved in New England Gas Company, D.P.U. 07-46 (2007) ("Settlement"). The Attorney General of the Commonwealth of Massachusetts ("Attorney General"), who is a signatory to the Settlement, opposes the Company's request.[1] The Department docketed this matter as D.P.U. 08-64.

NEGC is a division of Southern Union Company ("SUG") and provides natural gas distribution service to approximately 53,000 residential, commercial, and industrial customers in six Massachusetts communities located in the Fall River and North Attleboro service areas (Company Petition at 1). These two areas represent the former service territories of Fall River Gas Company and North Attleboro Gas Company, respectively, both of which were merged with SUG in September 2000. See Southern Union Company/Fall River Gas Company, D.T.E. 00-25 (2000); Southern Union Company/North Attleboro Gas Company, D.T.E. 00-26 (2000).

On September 26, 2008, the Attorney General filed a notice of intervention pursuant to G.L. c. 12, § 11E. Pursuant to notice duly issued, the Department held a public hearing and

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[1] Signatories to the Settlement are NEGC, the Attorney General, and the Low-Income Energy Affordability Network. D.P.U. 07-46, at 1.

procedural conference on October 8, 2008. The Department held one day of evidentiary hearings on December 17, 2008. The evidentiary record consists of 35 exhibits filed in this proceeding. In addition, certain exhibits have been incorporated by reference pursuant to 220 C.M.R. § 1.10(3).[2]

In support of its filing, NEGC sponsored the testimony of one witness, Janet M. Simpson, partner of Dively and Associates. The Attorney General sponsored the testimony of one witness, Timothy Newhard, financial analyst for the Attorney General. The parties submitted initial briefs on January 6, 2009, and reply briefs on January 13, 2009.

B. Company Proposal

Pursuant to the earnings sharing mechanism ("ESM") contained in section 2.10 of the Settlement, NEGC argues that it is entitled to recover 50 percent of any earnings deficiency experienced below eight percent of its return on common equity ("ROE") from customers through an adjustment in distribution rates (Exh. NEGC-JMS at 2, 4). The Company states that, for the calendar year ending December 31, 2007, NEGC had an ROE of negative 7.54 percent and, therefore, is entitled to recover an earnings deficiency of $4,110,329 (id.). The Company sought recovery to take effect in the November 1, 2008 local distribution adjustment factor ("LDAF") subject to reconciliation or refund after the

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[2] The exhibits incorporated by reference are the following: all exhibits from D.P.U. 07-46 and the Company's rate case, New England Gas Company, D.P.U. 08-35; letter Orders to all gas and electric distribution companies dated February 14, 2003, and April 3, 2003, establishing filing requirements for annual returns; and all gas and electric company annual returns filed with the Department for the past three years.

Department's investigation in this proceeding (id. at 6). The Department, however, did not allow recovery in the November 1, 2008 LDAF, as the matter was "being investigated in D.P.U. 08-64." New England Gas Company, D.P.U. 08-GAF-P6, Letter Order at 1 (Oct. 31, 2008). The Company subsequently requested that if the Department does not allow recovery in the LDAF until November 1, 2009, the Company should be allowed to accrue carrying charges beginning November 1, 2008 (NEGC Comments on Recovery of Earnings Deficiency at 10 (Oct. 16, 2008)).

II. PROCEDURAL RULINGS

A. Attorney General's Motion to Dismiss

1. Introduction

On September 26, 2008, the Attorney General submitted a motion asking that the Department dismiss either NEGC's request for recovery through the Company's ESM or NEGC's request for a general increase in rates, filed on July 17, 2008, and docketed as D.P.U. 08-35 ("Motion to Dismiss").[3] On October 3, 2008, NEGC submitted an opposition

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[3] The ESM matter was filed pursuant to section 2.10 of the Settlement, which provides:

> If the Company's ROE for distribution service only, calculated using the earnings available for common equity and the year's average balance of common equity used in the return on common equity calculation as reported to the Department in the Company's Annual Return filed with the Department exceeds 12 percent, customers and the Company will share equally (50%/50%) in the excess. Similarly, if the ROE were to fall below 8 percent, customers and the Company will share equally (50%/50%) in the deficiency. For any year in which the ROE is outside this bandwidth, the 50 percent portion that is to be paid to or collected from customers would be made through distribution rate adjustments in the succeeding year, and the impact of this prior year adjustment

(continued…)

to the Attorney General's Motion ("Opposition to Motion to Dismiss"). In this Order, we address only the Attorney General's request to dismiss the ESM matter, D.P.U. 08-64.

2. Positions of the Parties

a. Attorney General

In seeking dismissal of either the proposed ESM rate adjustment or the general increase in distribution rates in D.P.U. 08-35, the Attorney General contends that the Company is inappropriately seeking to double-collect costs in violation of the Settlement approved in D.P.U. 07-46 (Motion to Dismiss at 2-5, citing Settlement Article 3, § 3.8). According to the Attorney General, the clear terms of the Settlement prohibit the Company from filing both cases because section 3.8 of the Settlement provides:

> Under no circumstances shall: (1) any charge under this Settlement Agreement or tariffs promulgated hereunder recover costs that are collected by the

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[3] (…continued)
would be excluded in calculating the subsequent year's sharing. Any adjustment under this paragraph 2.10 shall be subject to investigation and a full adjudicatory hearing before the Department.

The base rate matter was filed pursuant to section 2.11 of the Settlement, which provides:

> For 2007 and 2008, as tested on a calendar year basis, should the Company's ROE drop 3 percent below a 10 percent ROE to 7 percent, the Settling Parties agree that the Company has the right to file a distribution base rate case. For 2007 and 2008, as tested on a calendar year basis, should the Company's return increase 3 percent above a 10 percent ROE to 13 percent, the Attorney General may request the Department to open a rate case, which proceeding shall be commenced within 90 days from request. At least 30 days prior to the Company filing for rate relief under this article, the Company shall confer with the Attorney General and provide all work papers, calculations and assumptions supporting its ROE determination.

> Company more than once, or through some other rate, charge or tariff; or (2) any charge recover costs more than once in any other rate, charge or tariff collected by the Company, it being acknowledged by the Settling Parties that such collection(s), unless fully refunded with interest, as soon as reasonably possible, shall constitute a breach of this Settlement Agreement when discovered and generally known, and be deemed to violate the involved tariffs.

(id. at 3, citing Settlement Article 3, § 3.8). The Attorney General argues that by basing both cases on the operating results for the same twelve-month period, the Company is substantiating both cases with the same costs and seeking to "recover costs . . . more than once" from its customers, in clear violation of the Settlement (id. at 3-5).

The Attorney General also contends that either the ESM rate adjustment filing or the base distribution rate increase filing should be dismissed for failure to comply with Department precedent (id. at 2, 5-6). According to the Attorney General, Department precedent requires dismissal of a requested base rate increase where the request relies on a test year that overlaps, in whole or in part, with a test year on which the applicant previously relied (id. at 5-6, citing Boston Edison Company, D.P.U. 1720, Interlocutory Order at 7-11 (Jan. 17, 1984); Massachusetts Electric Company, D.P.U. 19257, Decision on Motion to Dismiss at 5-7, 12 (Oct. 4, 1977); Attorney General Brief at 12-13). The Attorney General argues that because both the ESM rate adjustment and the base rate case rely on an overlapping test year, Department precedent requires dismissal of one (Motion to Dismiss at 5; Attorney General Brief at 12-13).

b. Company

NEGC contends that the Attorney General has procedurally failed to meet the Department's standard of review for motions to dismiss (Opposition to Motion to Dismiss at 4). NEGC argues that a motion to dismiss requires the Department to determine whether a petitioner has failed to state a claim upon which relief can be granted and, in this case, the Attorney General has not demonstrated, or even alleged, that the Company cannot prove facts in support of its proposal (id. at 4-5).

The Company asserts that the Attorney General's interpretation of the D.P.U. 07-46 Settlement is flawed and does not support her position that NEGC's decision to file both a base rate case and an ESM rate adjustment violates the Settlement (id. at 6-7). NEGC argues that the costs that the Company seeks to recover in the ESM rate adjustment are not the same as the costs that it seeks to recover in the base rate case because one set of costs (i.e., the ESM rate adjustment) is a retrospective, finite recovery, while the other (i.e., the base rate relief) is a prospective, indefinite recovery (id. at 7-8). Moreover, NEGC maintains that the relevant Settlement provisions on which each case is based, sections 2.10 and 2.11, operate independently, with different thresholds, and do not in any way qualify, limit, or reference one another (id. at 8-9).

The Company also asserts that Department precedent does not prohibit the Company from filing a base rate case and an ESM rate adjustment that use the same test year (id. at 11-13, citing D.P.U. 1720, Interlocutory Order; D.P.U. 19257, Decision on Motion to Dismiss at 10, 12). The Company notes that, in fact, the Department recently permitted this

very scenario by allowing a company to pursue an earnings sharing rate adjustment while it was also seeking a significant rate adjustment to address the company's overall financial situation, and denying the Attorney General's motion to dismiss the rate adjustment (id. at 12-13, citing Bay State Gas Company, D.P.U. 07-89, Interlocutory Order on Appeal of Hearing Officer's Ruling on Scope and Motion to Dismiss (Apr. 18, 2008); Bay State Gas Company, D.P.U. 07-74, Letter Order (Oct. 31, 2007)).

3. Analysis and Findings

The Department's Procedural Rule, 220 C.M.R. § 1.06(6)(e), authorizes a party to move for dismissal of "all issues or any issue in [a] case" at any time after the filing of an initial pleading. The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted was articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988). In D.P.U. 88-123, at 26-27, the Department denied the respondent's motion to dismiss, finding that it did not appear "beyond doubt that [the petitioner] could prove no set of facts in support of its petition."[4]

In determining whether to grant a motion to dismiss, the Department takes the assertions of fact as true and construes them in favor of the non-moving party. Id. Dismissal

[4] Although D.P.U. 88-123 refers to Massachusetts Rule of Civil Procedure 12(b)(6), the Department has not adopted Rule 12(b)(6). See Attorney General v. Department of Public Utilities, 390 Mass. 208, 212-213 (1983) (rules of court do not govern procedure in executive Department). Rules of court, while not binding on the Department, may provide instructive guidance. Massachusetts Institute of Technology, D.P.U. 94-101/95-36, at 11 n.5 (1995).

will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Id.

The Department will consider, in this Order, only the appropriateness of dismissing the instant proceeding. The Department will address the appropriateness of dismissing the rate case proceeding as part of our investigation in D.P.U. 08-35.

In order for the Attorney General to prevail on her motion to dismiss, she would need to prove that there are no circumstances under which the Company would be entitled to an ESM rate adjustment. Regarding the Attorney General's first argument -- that NEGC is seeking to double-collect the same costs in violation of the Settlement -- it does not appear beyond doubt that NEGC can prove no set of facts in support of its petition. The Attorney General has based her argument on her interpretation of the Settlement: that section 3.8 of the Settlement prohibits the Company from recovering the same costs in two different proceedings and that the ESM rate adjustment and the base rate case seek recovery of the same costs. The Company contends, however, that the two provisions, sections 2.10 and 2.11 of the Settlement, were meant to operate independently and, therefore, argues that section 3.8 of the Settlement does not prohibit the Company from recovering costs under both provisions (Opposition to Motion to Dismiss at 7-9). Where there is a reasonable alternative interpretation of the Settlement, we find that the Attorney General has not shown that the Company is entitled to no relief under any statement of facts that could be proven in support of its claim. The Attorney General cannot demonstrate that the clear and unambiguous language

of the Settlement expressly prohibits the Company from filing a rate case and also obtaining recovery pursuant to the ESM.

Regarding the Attorney General's second argument -- that Department precedent prohibits the Company from basing both the rate case and the ESM rate adjustment on overlapping test years -- we note that the precedent on which the Attorney General relies does not stand for the proposition she is arguing. In D.P.U. 1720, Interlocutory Order at 7-11, the Attorney General challenged the company's filing on the ground that the company's test year was so stale as to defeat the ratemaking scheme and filed a motion to compel the company to amend its filing or, in the alternative, to dismiss the company's filing with leave to refile using an updated test year. Id. at 7. The Department denied the Attorney General's motion on the ground that the Attorney General had not provided an adequate basis for the relief requested. Id. at 11. Thus, this case has no precedential value regarding overlapping test years because the Department was never asked to address that issue.

The Department's Order in D.P.U. 19257, Decision on Motion to Dismiss, concerned overlapping test years but is still not applicable here. In that case, the Department held that insufficient time had elapsed between the test periods of two consecutive rate cases to enable the Department to determine whether the rates from the prior rate case needed to be adjusted in light of changed circumstances. Id. at 7. In effect, the Department viewed the subsequent rate case filing as the company's attempt to relitigate the issues in the prior rate case. Id. at 7-10. The Department stated that, in the future, "we shall refuse to hear any rate increase application based on a test year that overlaps, in whole or in part, a test year previously relied on by the

applicant, except when extraordinary circumstances have made a previous rate order confiscatory." Id. at 12. Thus, while the Department's general policy is to not rely on the same or overlapping test years for consecutive rate cases, the instant case can be distinguished because we are addressing the issue of a company proposing a base rate increase and an ESM rate adjustment.

Accordingly, for the foregoing reasons, the Department finds that the Attorney General has failed to establish that NEGC could prove no set of facts to justify review of the proposed request for an ESM rate adjustment. See D.P.U. 88-123, at 26-27. Therefore, we deny the Attorney General's motion to dismiss this proceeding.

B. Attorney General's Motion for Leave to Reopen the Record

1. Introduction

On December 2, 2008, pursuant to the procedural schedule in this matter, the Attorney General filed the testimony of her witness, Mr. Newhard. On December 12, 2008, the Company submitted a motion for leave to file rebuttal testimony ("Motion").[5] The Attorney General opposed the Company's Motion on due process grounds, asking that the Department deny the Company's Motion or, in the alternative, amend the procedural schedule to allow for discovery on the Company's rebuttal testimony and for the Attorney General to file her own rebuttal testimony.

At the December 17, 2008 evidentiary hearing, the Hearing Officer granted the Company's Motion (Tr. at 4-5). To address the issues raised by the Attorney General in her

[5] The Company included the prefiled rebuttal testimony of Ms. Simpson with its Motion.

opposition to the Company's Motion, the Hearing Officer offered the Attorney General an opportunity to provide rebuttal testimony (id. at 5-8).[6] The Attorney General expressed her concern that the Department was not allowing her sufficient time to adequately address the issues raised by the Company in its rebuttal testimony, but stated that she would proceed with the hearing (id. at 6-11, 94). Subsequently, the Attorney General cross-examined Ms. Simpson on her rebuttal testimony (id. at 95-101). In addition, the Attorney General's witness, Mr. Newhard, addressed Ms. Simpson's rebuttal testimony (id. at 49-50).

On January 6, 2009, the Attorney General submitted a motion asking the Department to reopen the evidentiary record and admit the rebuttal testimony of her witness, Frank Radigan ("Motion to Reopen").[7] On January 13, 2009, NEGC submitted an opposition to the Attorney General's Motion ("Opposition to Motion to Reopen").

2. Positions of the Parties

a. Attorney General

In her Motion to Reopen, the Attorney General asserts that there is good cause to reopen the evidentiary record because the Department denied her earlier request to respond to the Company's rebuttal testimony and the Administrative Procedures Act guarantees the

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[6] The Hearing Officer stated that there would be no changes made to the briefing schedule (Tr. at 4, 6-7). Nevertheless, the Hearing Officer offered the Attorney General the opportunity to provide rebuttal testimony and cross-examine Ms. Simpson on her rebuttal testimony that day if she were prepared to do so, two days later, or early the following week (id. at 6-7).

[7] The Attorney General included the prefiled rebuttal testimony of Mr. Radigan with her Motion to Reopen.

Attorney General the right to submit rebuttal evidence (Motion to Reopen at 1-2, citing G.L. c. 30A, § 11(3)). Specifically, the Attorney General argues that the Department, in effect, denied her request to respond to the Company's rebuttal testimony when the Hearing Officer indicated that the only modification that would be allowed to the procedural schedule would be to allow an additional day for the Attorney General to conduct cross-examination on the Company's rebuttal testimony (id. at 1-2 & n.1, citing Tr. at 4, 6-7). The Attorney General states that, had the Department allowed the Attorney General to file her rebuttal testimony, she would have provided evidence on various issues such as accounting transparency, appropriate types of accounting data, and relevant requirements for utilities in other jurisdictions (id. at 2). Accordingly, the Attorney General argues that the Department should reopen the record and admit the rebuttal testimony of Frank Radigan (id. at 2).

b. Company

NEGC argues that while G.L. c. 30A, § 11(3) creates the right to submit rebuttal evidence, it does not guarantee the right to file rebuttal testimony, nor does it prescribe the form, format, or timing of any allowed rebuttal evidence (Opposition to Motion to Reopen at 3-4). The Company notes that the Department has wide discretion to structure the hearing process and rule on evidence -- particularly rebuttal evidence -- and need not comport with any particular form to provide due process to the parties (id. at 4, citing Rate Setting Commission v. Bay State Medical Center, 422 Mass. 744, 752 (1996); Strasnick v. Board of Registration in Pharmacy, 408 Mass. 654, 660-661 (1990); Langlitz v. Board of Registration of Chiropractors 396 Mass. 374, 377 (1985); Drake v. Goodman, 386 Mass. 88, 92 (1982)).

NEGC further argues that the Department has already provided the Attorney General with ample opportunity to present rebuttal evidence and the Attorney General has availed herself of that opportunity by filing Mr. Newhard's testimony, which responded directly and exclusively to the Company's filing (id. at 6). The Company also notes that, where Ms. Simpson's rebuttal testimony responded only to Mr. Newhard's testimony and did not raise any new issues, there was nothing further for the Attorney General to rebut (id. at 7). In fact, the Company asserts, Mr. Radigan's proffered rebuttal testimony offers nothing new and simply restates Mr. Newhard's initial response to the Company's filing (id.). According to NEGC, the Attorney General does not have a right to present rebuttal evidence where it presents nothing new and serves no purpose other than to bolster the Attorney General's affirmative case and duplicate prior testimony (id. at 4-5, 7, 9, citing Mason v. General Motors Corp. 397 Mass. 183, 193 (1986); Drake, 386 Mass. at 92, 93; Urban Investment and Development Company v. Turner Construction, 35 Mass. App. Ct. 100, 103 (1993); Teller v. Schepens 25 Mass. App. Ct. 346, 350-351 (1988)). The Company further asserts that the Department has the discretion to exclude Mr. Radigan's proffered testimony because it is duplicative and repetitious of the evidence already in the record and will add nothing of value (id. at 9, citing Town of Sudbury v. Department of Public Utilities 351 Mass. 214, 219-220, 222 (1966)).

The Company also argues that, notwithstanding the lack of new issues to rebut, the Department extended two additional opportunities to the Attorney General to rebut Ms. Simpson's testimony, either at the December 17, 2008 evidentiary hearing or at a

follow-up hearing (id. at 2, 7, citing Tr. at 8, 49-50, 108). The Company notes that the Attorney General rejected the opportunity to return for a subsequent hearing but chose instead to have Mr. Newhard respond to and critique Ms. Simpson's written rebuttal testimony (id. at 2, citing Tr. at 9, 49-50, 108). The Company argues that if the Attorney General had wanted Mr. Radigan to testify on rebuttal, she could have offered his testimony in place of Mr. Newhard's (id. at 9). Therefore, the Company contends, the Department has amply protected the Attorney General's due process rights under G.L. c. 30A, § 11(3), and there is no basis for the Department to grant the Attorney General's Motion (id. at 3).

Moreover, the Company argues that the Attorney General has failed to meet the legal standard for reopening the record because Mr. Radigan's proffered testimony does not provide any "previously unknown or undisclosed information" but simply presents the exact same arguments made by Mr. Newhard in his pre-filed and oral testimony (id. at 8-9). Finally, the Company argues that the Department should deny the Attorney General's Motion in the interests of administrative efficiency and fairness (id. at 10).

3. Analysis and Findings

The Department's Procedural Rule on reopening the evidentiary record, 220 C.M.R. § 1.11(8), states, in pertinent part, "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." Good cause for purposes of reopening the record has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the

decision. Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B at 4-7 (1990); Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A at 11-12 (1986).

The Attorney General seeks to reopen the record in this proceeding to admit the proffered rebuttal testimony of Mr. Radigan in response to the rebuttal testimony of Ms. Simpson. In supporting her request, the Attorney General claims that there is good cause to reopen the record because G.L. c. 30A, § 11(3), the Administrative Procedures Act, gives her the absolute right to respond to Ms. Simpson's rebuttal testimony but the Department denied the Attorney General that right. The Attorney General is not correct. Although it was not on the schedule that the Attorney General would have preferred, we find that the Hearing Officer offered the Attorney General an appropriate opportunity to provide rebuttal evidence and respond to the rebuttal testimony of Ms. Simpson -- an opportunity which she declined. The Attorney General opted to cross-examine Ms. Simpson on her rebuttal testimony at the hearing, rather than continue the hearing to another day or offer any further rebuttal testimony (Tr. at 10-11, 94). In addition, the Attorney General's witness responded to Ms. Simpson's rebuttal testimony that day (id. at 49-50). The Attorney General cannot now change her mind regarding the presentation of her rebuttal case.

Nor is the Attorney General correct in her assertion that the only modification of the procedural schedule offered to her was an additional hearing day on which to conduct cross-examination on the Company's rebuttal testimony. While the Hearing Officer indicated that the briefing schedule would not be altered, she provided the Attorney General with the

opportunity to rebut Ms. Simpson's testimony either at the hearing on that day or on a follow-up hearing day (id. at 4, 6-7).

The Attorney General's argument also fails to address good cause as we have defined it: a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Rather than attempting to show that Mr. Radigan's testimony provides previously unknown or undisclosed information, the Attorney General claims that there is good cause to reopen the record simply because G.L. c. 30A, § 11 gives her that right.[8] Not only has the Attorney General failed to demonstrate that the information contained in Mr. Radigan's proffered testimony is new, the Attorney General's objections to how the Hearing Officer addressed the Company's Motion to submit rebuttal testimony are also not new. The Attorney General was aware of the Hearing Officer's ruling related to rebuttal testimony, as evidenced by the Assistant Attorney General's numerous objections thereto when the rulings were made (Tr. at 6-11, 94-95).[9] The Attorney

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[8] The Company correctly notes that G.L. c. 30A, § 11(3) does not guarantee the right to file rebuttal testimony, nor does it prescribe how the Department must structure the hearing process or make evidentiary rulings to provide due process to the parties. See Western Massachusetts Bus Lines, Inc. v. Department of Public Utilities, 363 Mass. 61, at 63 (1973); Verizon New England, Inc., D.T.E. 01-20, Interlocutory Order on CLEC Coalition's Appeal of Hearing Officer's May 18, 2001 Ruling at 8 (2001); Boston Edison Company, D.P.U. 96-23, at 3-4 (1997); see also Strasnick, 408 Mass at 660-661. Moreover, there is no right to present rebuttal evidence if it only supports a party's affirmative case. Drake, 386 Mass at 92-93.

[9] If the Attorney General was aggrieved by the Hearing Officer's rulings related to the Company's Motion, a more appropriate remedy would have been to appeal the Hearing Officer's rulings to the Commission rather than to file a motion to reopen the evidentiary record.

General cannot now argue, nearly three weeks after the record has closed, that the Department's failure to permit rebuttal testimony was previously unknown or undisclosed information sufficient to satisfy the definition of good cause for the purpose of reopening the evidentiary record. We find, therefore, that the Attorney General has not shown good cause to reopen the evidentiary record in this proceeding. Accordingly, we deny the Attorney General's Motion to Reopen the Record to submit rebuttal testimony.

III. EARNINGS SHARING RATE ADJUSTMENT

A. Positions of the Parties

1. Attorney General

The Attorney General challenges the Company's right to seek an ESM rate adjustment on several grounds. First, the Attorney General argues that the Settlement does not permit NEGC to file both an ESM rate adjustment and a base rate case and prohibits NEGC from double-collecting the same costs in two different rates or charges (Attorney General Brief at 9-10, citing Settlement Article 3, § 3.8). The Attorney General asserts that unless there is explicit language in the Settlement or the D.P.U. 07-46 record to show that the Company is entitled to both forms of recovery, the Department has no basis to conclude otherwise (id. at 11, citing NSTAR Electric, D.T.E./D.P.U. 07-4-A, at 19 (2008); Attorney General Reply Brief at 3).

Second, the Attorney General asserts that NEGC is requesting an ESM rate adjustment based on operating results for calendar year 2007, which means that the Company is basing its recovery in part on financial results prior to July 31, 2007, when the Department approved the

Settlement (Attorney General Brief at 11). The Attorney General contends that the Settlement does not specify that an ESM filing could include recovery of revenues for periods before Department approval of the Settlement (id., citing NSTAR Electric Company, D.T.E./D.P.U. 07-15/17/19, at 32 (2008)). The Attorney General also asserts that allowing the ESM rate adjustment will result in retroactive ratemaking for the eight-month period in 2007 prior to the Department's approval of the Settlement (id. at 12, citing Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy, 440 Mass. 625, 637 (2004); Attorney General Reply Brief at 3 & n.3).

Third, the Attorney General argues that the Settlement is silent as to how any ESM rate adjustment is to be recovered, which means that the Department has the discretion to determine where the ESM rate adjustment should be recovered if at all (Attorney General Reply Brief at 12). Therefore, the Attorney General asserts that where Department precedent holds that an ESM rate adjustment establishes a new level of permanent base rates, then such recovery should be collected in base rates and not through the LDAF (id. at 12-13, citing Bay State Gas Company, D.P.U. 08-41, at 3 (2008)).

In addition to challenging NEGC's right to seek an ESM rate adjustment, the Attorney General makes several arguments regarding the Company's calculation of the ESM rate adjustment. The Attorney General first argues that the Company has not filed an appropriate annual return upon which an ESM rate adjustment can be calculated and, therefore, has failed to demonstrate its entitlement to an ESM rate adjustment (Attorney General Brief at 2, 5-7; Attorney General Reply Brief at 4-7). The Attorney General next contends that the Company

has failed to provide substantial evidence concerning the appropriateness of adjustments to its annual return, and the magnitude of the errors therein leads to gross overstatement of the Company's balance of common equity (Attorney General Brief at 2, 7-9; Attorney General Reply Brief at 8-12). In addition, the Attorney General asserts that the Company's proposed ESM rate adjustment fails to normalize cost recovery for weather and the annualization of all distribution rate increases (Attorney General Brief at 15).[10]

Moreover, the Attorney General contends that the Company's request for a $4.1 million ESM rate adjustment on top of a $5.6 million base rate increase (a total increase of $9.7 million) would, if approved by the Department, constitute a 74 percent base rate increase and a return at a rate of over 20 percent (id. at 14-15; Attorney General Reply Brief at 2). The Attorney General argues that such an increase would be unconscionable in its magnitude, unfair to customers, and unconstitutional (Attorney General Brief at 14-15). According to the Attorney General, this return would necessarily set rates higher than the Company's cost of providing service and eclipse any customer benefit under the Settlement, which established only a $4.1 million rate increase over two years in lieu of a potential $7.8 million rate increase (id. at 13-14; Attorney General Reply Brief at 2). The Attorney General asserts that where the Settlement expressly provides that it is to be interpreted for the benefit of customers, the Department must enforce the Settlement according to its terms (Attorney General Reply Brief at 2, citing Settlement at 1-2). The Attorney General further argues that the Department must

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[10] The Attorney General also incorporates by reference and renews the arguments set forth in her previously filed motions and comments (Attorney General Brief at 4 n.2).

establish just and reasonable rates, which the requested recovery is not, and need not ensure that the Company is made whole for past harm (id. at 4, citing Attorney General v. Department of Telecommunications and Energy, 438 Mass 256, 264 n.13 (2002); Berkshire Gas Company, D.P.U. 96-67, at 6 (1996)).

Finally, the Attorney General argues that the Company knew of a revenue deficiency and a potential ESM filing as early as March 2008 but withheld its ESM filing until September 2008, after filing its request for a base rate increase (Attorney General Brief at 2). Therefore, according to the Attorney General, the Company has deliberately attempted to have simultaneous, multiple rate increases reviewed simultaneously, in separate dockets, under less than ideal time constraints (id.). The Attorney General contends that this scenario distracts the Department from fully considering the impact of each filing on the other and masks the total base distribution rate increase that the Company seeks to recover (id.).

2. Company

The Company argues that the clear and unambiguous terms of the Settlement allow it to pursue both the rate case and ESM recoveries simultaneously (Company Brief at 3-4; Company Reply Brief at 5-10, 12-14). Specifically, NEGC contends that it is entitled to maintain both an ESM petition and a base rate case because the Settlement provides two exceptions to the $4.1 million phased-in rate increase to ensure that the Company would have sufficient revenues to support its utility operations (Company Reply Brief at 12-14). The Company notes that sections 2.10 and 2.11 of the Settlement operate independently of one another, rely on different thresholds for recovery, are calculated differently, and contemplate two different types of

adjustments: one temporary and one involving a more permanent change in base rates (id. at 7-10).[11]

The Company asserts that recovery of the ESM rate adjustment does not overlap with recovery of increased base rate revenues and recovery under both provisions will not result in unjust or unreasonable rates (Company Brief at 3; Company Reply Brief at 12-14). In addition, NEGC argues that the ESM rate adjustment is not retroactive ratemaking because the Department specifically allowed for recovery of those costs when it authorized the Settlement (Company Reply Brief at 4-5). The Company further argues that using the same test year for both cases is not contrary to Department standards (id. at 10-11, citing D.P.U. 19257, Decision on Motion to Dismiss at 10, 12; Opposition to Motion to Dismiss at 11-13, citing D.P.U. 1720, Interlocutory Order).

The Company contends that because the ESM rate adjustment arises from a two-year Settlement and not from a long-term performance-based ratemaking ("PBR") plan, the ESM involved here operates differently from the ESMs established by the Department in other cases (Company Brief at 15-17). The Company argues that a PBR plan is specifically structured to change base rates on an annual basis in accordance with a pricing formula that is designed to provide utilities with adequate operating revenues over the long term and to encourage companies to implement long-term business strategies (id. at 15, citing Bay State Gas

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[11] According to the Company, there is nothing in section 3.8 of the Settlement that prohibits NEGC from seeking a change in rates under both sections 2.10 and 2.11. (Company Reply Brief at 10). In addition, the Company argues that section 3.8 does not apply here because the rate case and the ESM proceeding do not address the same costs (id. at 6-7).

Company, D.T.E. 05-27, at 359-360, 399-401 (2005); Boston Gas Company, D.T.E. 03-40, at 436-437, 495-498, 501-502 (2003); Boston Gas Company, D.P.U. 96-50, at 242-243, 320-326 (Phase I) (1996)). Moreover, the Company asserts that an ESM in a typical PBR plan uses a much greater sharing bandwidth and different sharing percentages (id. at 16).

With respect to the appropriate method of ESM recovery, the Company notes that the Settlement anticipates recovery in a single, annual period through the LDAF and that the local distribution adjustment clause ("LDAC") tariff allows for recovery of earning sharing revenues (id. at 17-20, citing LDAC § 1.16). Specifically, the Company argues that the Settlement provides that any earnings sharing is to be made through "distribution rate adjustments," and the LDAF is the Company's "distribution rate adjustment" factor, designed to allow for the recovery of distribution-related costs on an adjustable and reconciling basis (id. at 19, citing Settlement Article 2, § 2.10). The Company contends that where it is proposing to recover a fixed and non-recurring amount (i.e., no more and no less than $4,110,329), such recovery cannot be accomplished through base rates which are non-reconciling and permanent (id. at 17). The Company argues that if the Department were to direct the Company to recover the ESM rate adjustment through base rates, the Department would first have to adjust base rates upward to collect that amount and then, subsequently, reduce base rates to end recovery, with no way to ensure that the Company recovered only the approved amount (id. at 19). Therefore, the Company argues that the appropriate vehicle for recovery of the ESM is the LDAF, which permits recovery of a discrete amount on a one-time basis (id. at 18-20).

The Company asserts that it has properly and accurately calculated the earnings sharing deficiency consistent with section 2.10 of the Settlement (id. at 4-6). The Company contends that its annual return contains no fatal flaws and is not inherently erroneous or unreliable (id. at 5-6, 12-14; Company Reply Brief at 2-4). Moreover, the Company contends that the form of its annual return is not a proper basis for denial of its ESM petition (Company Brief at 6-9; Company Reply Brief at 2-4). Finally, the Company contends that normalizing for weather or annualizing the rate increase is not consistent with the terms of the Settlement (Company Brief at 14; Company Reply Brief at 14).

B. Analysis and Findings

Under the terms of the Settlement approved by the Department in D.P.U. 07-46, the Company received a base revenue increase of $4,200,739 (a $2,200,739 increase on August 1, 2007, and a subsequent $2,000,000 increase on April 1, 2008). D.P.U. 07-46, at 6, citing Settlement Article 2, § 2.2. The Department approved the Settlement in lieu of a rate case proceeding where the Company stated it would have sought a base revenue increase of $7.8 million. Id. at 6, 9, citing Settlement Article 1, § 1.2. The Department approved the Settlement, finding that it was consistent with both applicable law and the public interest and resulted in just and reasonable rates. Id. at 9. In addition, the Settlement states that its terms cannot be "used or interpreted to diminish, in any way, the intended customer benefit" related to the Settlement. Settlement at 1-2.

Under section 2.4 of the Settlement, the Company is prohibited from seeking any other distribution rate increase that would become effective prior to July 1, 2009, except as

specifically provided by sections 2.10, 2.11, and 2.12 of the Settlement.[12] The Attorney General is a signatory to the Settlement and now disputes the Company's interpretation thereof. Therefore, we must determine whether, as the Company proposes, the Settlement permits NEGC to file both an ESM rate adjustment (pursuant to section 2.10) and a base rate case (pursuant to 2.11) or whether, as the Attorney General argues, the Settlement prohibits the Company from pursuing both rate case and ESM recoveries.

As discussed in Section II.A., above, we have denied the Attorney General's motion to dismiss this matter because she cannot demonstrate that the clear and unambiguous language of the Settlement expressly prohibits the Company from filing a rate case and also obtaining recovery pursuant to the ESM. The Settlement also does not contain clear and unambiguous language expressly permitting NEGC to pursue both the rate case and ESM recoveries. Where the language of a Department-approved Settlement is not clear, it falls to the Department to interpret the Settlement in a manner that is both consistent with our precedent and in the public interest. See D.P.U. 07-46, at 6, 9.

Today, the Department approved a base distribution rate increase for the Company pursuant to G.L. c. 164, § 94. New England Gas Company, D.P.U. 08-35 (Feb. 2, 2009). In order to determine whether the Company is also entitled to an ESM rate adjustment, it is necessary to consider the purpose of the ESM. NEGC asserts that the ESM provision contained in section 2.10 of the Settlement is designed to ensure that the Company collects a

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[12] The language of sections 2.10 (ESM) and 2.11 (rate case filing) of the Settlement is provided in footnote 3 above. Section 2.12 addresses exogenous factor recovery, which is not at issue in this proceeding.

minimum level of operating revenues during the term of the Settlement (Company Brief at 16-17). In essence, the Company argues that the ESM recovery is designed to make NEGC whole for a share of loss that it experienced in 2007 -- a year that its ROE fell outside of the bandwidth established in section 2.10 (see id. at 15-19). The Attorney General, however, contends that the Department's obligation is to establish just and reasonable rates and not to ensure that the Company is made whole (Attorney General Reply Brief at 4).

Further, both the Attorney General and the Company agree that the Settlement is not explicit as to how the ESM should be recovered and, therefore, the manner of ESM recovery is left to the discretion of the Department (see Company Brief at 19; Attorney General Reply Brief at 12). Consistent with its argument that the ESM is intended to allow the Company to recover a finite deficiency in its earnings in a prior year, NEGC urges the Department to conclude that the LDAF is the appropriate vehicle to collect ESM recoveries (Company Brief at 17-20). Alternatively, the Attorney General contends that the Company's proposal to recover ESM costs through the LDAF is not supported by the Settlement and, instead, Department precedent supports the recovery of an ESM rate adjustment as a new permanent level of base rates (Attorney General Reply Brief at 12-13).

The language of the Settlement does not clearly address or state whether collection of an ESM rate adjustment is intended to be a finite amount through the LDAF or, rather, an adjustment to base rates going forward. Section 2.10 of the Settlement states that ESM recoveries are to be "made through distribution rate adjustments." In particular, the

Settlement does not refer to recovery of a "fixed and non-recurring amount," which is how the Company characterizes the ESM recovery in this instance (Company Brief at 17).

The Department has approved ESMs in the context of rate freezes, including those contained in PBR plans, where a company is precluded from seeking relief through a rate filing pursuant to G.L. c. 164, § 94. D.P.U. 96-50 (Phase I) at 325-326; see also D.T.E. 03-40, at 500-502; NYNEX Price Cap, D.P.U. 94-50, at 197 (1995). In the context of a rate freeze, ESMs are designed to protect companies against the potential of substantial under-earnings.[13] D.P.U. 96-50 (Phase I) at 325; see also D.T.E. 03-40, at 500; D.P.U. 94-50, at 197.

Currently, Bay State Gas Company ("Bay State"), Blackstone Gas Company ("Blackstone"), and Boston Gas Company have PBR plans that contain an ESM provision similar to the ESM provision contained in the D.P.U. 07-46 Settlement. Bay State Gas Company, D.T.E. 05-27, at 401-405 (2005); Blackstone Gas Company, D.T.E. 04-79, at 5 (2004); D.T.E. 03-40, at 497-502. When Blackstone's and Bay State's earnings fell outside the approved bandwidth, the Department approved adjustments to the companies' base distribution rates going forward, pursuant to their ESMs. Blackstone Gas Company, D.P.U. 08-29, Letter Order (Oct. 31, 2008); Bay State Gas Company, D.P.U. 07-74, Letter Order (Oct. 31, 2007); Blackstone Gas Company, D.T.E. 05-42 (2005). Once set in place, the

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[13] The ESM is designed as a bandwidth around the allowed rate of return so as to also protect ratepayers from the possibility of excessive over-earnings by the company.

ESM base distribution rate adjustment continues until the Department sets new just and reasonable rates in a base rate proceeding pursuant to G.L. c. 164, § 94.[14]

In all previous instances where the Department has interpreted an ESM, the mechanism has been treated as a means to stabilize a company's earnings going forward. The Company argues that because the rate freeze term, the ESM bandwidth, and the ESM sharing percentages contained in section 2.10 of the Settlement all differ from the ESM provisions contained in the PBR plans described above, the Department should interpret the intent of the ESM in the Settlement in a different manner (Company Brief at 16). We disagree. The Department has not interpreted the length of the term (whether a two-year settlement or a ten-year PBR plan) or the nature of the mechanism in which the ESM is found as relevant to the application of the ESM, nor do we conclude that such a finding is appropriate in this instance. An ESM rate adjustment serves to protect both ratepayers and companies in a situation where a company cannot file a rate case, either because of a rate freeze, a PBR plan, or a rate settlement. What drives an ESM's existence and subsequent application is that it provides protection in recognition of under- or over-earnings at a time when the company's rates are otherwise fixed.

We have never interpreted the purpose of an ESM to make a company whole for past under-earnings in the manner in which the Company suggests. Further, we find no language in the Settlement or the facts of this case to suggest that the purpose of the ESM contained in

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[14] Alternatively, the ESM rate adjustment could be supplanted by a subsequent ESM rate adjustment.

section 2.10 of the Settlement differs from those ESMs contained in other gas company PBR plans.

Therefore, we find that section 2.10 of the Settlement is designed to act as a means to stabilize the Company's revenues going forward during the term of its two-year rate freeze when NEGC would otherwise not be permitted to file a rate case pursuant to G.L. c. 164, § 94. Section 2.11 of the Settlement contains another way for the Company to stabilize its revenues whereby the Company "has the right to file a distribution base rate case" prior to the expiration of its two-year rate freeze on July 1, 2009 (i.e., where the Company's ROE drops to seven percent). The Company invoked section 2.11 of the Settlement when it filed its base rate increase in D.P.U. 08-35.

Pursuant to G.L. c. 164, § 94, the Department has approved new base rates in D.P.U. 08-35 that will enable the Company to recover its just and reasonable costs and earn a reasonable return on its investment. Thus, the base rate adjustment in D.P.U. 08-35 supplants any need for an ESM rate adjustment. Permitting an ESM rate adjustment on top of these newly designed rates would enable the Company to earn a higher return on its investment than is just and reasonable or in the public interest. The Department interprets the Settlement to require ESM recovery to be made prospectively in base distribution rates until the Department sets new rates in a subsequent base rate case or ESM proceeding. Therefore, where the Order issued today in D.P.U. 08-35 sets new rates for NEGC at a just and reasonable level as of

February 3, 2009, we find that an ESM rate adjustment is not warranted under section 2.10 of the Settlement.[15] Based on this finding, we need not address the parties' remaining arguments.

IV. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the Attorney General's Motion to Dismiss is denied;

FURTHER ORDERED: That the Attorney General's Motion to Reopen the Record is denied;

FURTHER ORDERED: That New England Gas Company's request to recover an earnings sharing adjustment is denied; and it is

FURTHER ORDERED: That New England Gas Company shall comply with all other orders and directives contained in this Order.

By Order of the Department,

/s/
Paul J. Hibbard, Chairman

/s/
W. Robert Keating, Commissioner

/s/
Tim Woolf, Commissioner

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[15] According to the Company, it had sufficient financial information available to allow it to file either the rate case or the ESM request or both as early as April 1, 2008 (Tr. at 26-28). The Department notes, however, that NEGC opted to file this request for an ESM rate adjustment on September 17, 2008, two months after filing its base rate increase in D.P.U. 08-35.

An appeal as to matters of law from any final decision, order, or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by filing a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order, or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order, or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.